

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIE JAMES LEWIS	:	CIVIL ACTION
	:	
v.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, <u>et al.</u>	:	NO. 00-611

MEMORANDUM AND ORDER

BECHTLE, J. December , 2000

Presently before the court in this 28 U.S.C. § 2254 action are petitioner Willie James Lewis's ("Petitioner") Petition for Writ of Habeas Corpus, the Commonwealth of Pennsylvania's Answer thereto, and the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells ("Report and Recommendation"). For the reasons set forth below, the court will approve and adopt the Report and Recommendation of Magistrate Judge Wells.

I. BACKGROUND

On May 6, 1992, Petitioner pled guilty to robbery, burglary and criminal attempted rape. (Rep. & Recomm. at 1.) On the same day he was sentenced to an aggregate term of 6½ to 20 years, consisting of: 5 to 10 years for Attempted Rape; a consecutive term of 18 months to 10 years for robbery; and a term of 18 months to 10 years for burglary, to run concurrent to the attempted rape and robbery sentences. Id. at 2. Petitioner did not directly appeal his plea. Id.

On January 7, 1997, Petitioner filed a petition for

collateral review pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541, et seq., challenging the constitutionality of: 1) 42 Pa. Cons. Stat. Ann. § 9791 in its retroactive application to Petitioner; and 2) the Pennsylvania Probation and Parole Board's (the "Board") policy regarding parole eligibility of sex offenders and violent criminals. Id. The petition was denied on April 2, 1997, and an appeal to the Superior Court was dismissed on December 1, 1997 for failure to file a brief. Id. at 3. On May 7, 1998, Petitioner filed a petition for habeas corpus in state court alleging that the Board's denial of parole after expiration of his minimum sentence, along with his continued incarceration, violated his plea agreement and imposed an ex post facto restraint. Id. The petition was denied as successive on June 1, 1998. Id. Petitioner appealed to the Superior Court alleging, inter alia, that the state breached the plea agreement and did not afford him effective assistance of counsel in his plea negotiations. Id. The appeal was dismissed for failure to file a brief. Id. Subsequently, Petitioner filed a petition for habeas corpus and accompanying brief with the Pennsylvania Supreme Court. Id. The petition raised two issues: 1) whether Petitioner's guilty plea was knowing and intelligent; and 2) whether trial counsel was effective. Id. The petition was denied on December 2, 1999. Id.

Petitioner filed the instant Petition for Writ of Habeas Corpus on March 10, 2000.

II. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 2254¹ and reviews the magistrate judge's report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(C).²

III. DISCUSSION

Petitioner asserts that ineffective assistance of counsel led him to enter an involuntary and unknowing plea agreement. (Pet. at 9-10; Mem. in Supp. of Pet. for Writ of Habeas Corpus ("Mem. in Supp.") at unnumbered p.1.) The Commonwealth argues that Petitioner is not entitled to habeas relief because his claims are procedurally defaulted and without merit. (Mem. of Law in Opp'n to Pet. for Writ of Habeas Corpus ("Commonwealth's Answer") at 4, 11.)

1. The statute provides, in pertinent part:

[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a).

2. The statute provides, in pertinent part:

[The court] shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [and] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

28 U.S.C. § 636(b)(1)(C).

A. Exhaustion

Before a federal court will entertain a petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254, the petitioner must have exhausted his remedies in state court or there must be an absence of available state corrective process. Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995) (citing Story v. Kindt, 26 F.3d 402, 405 (3d Cir. 1994)). A claim is exhausted if it has been fairly presented to the state trial court, intermediate appellate court, and highest court. 28 U.S.C. § 2254(b); Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000); Evans v. Court of Common Pleas, Delaware County, Pennsylvania, 959 F.2d 1227, 1230-31 (3d Cir. 1992) (citation omitted). Fair presentation occurs when the claim presented in state court is "substantially equivalent" to the claim raised in the habeas petition. Picard v. O'Connor, 404 U.S. 270, 278 (1971); Lesko v. Owens, 881 F.2d 44, 50 (3d Cir. 1989) (citing Picard). A petitioner will not be deemed to have exhausted state remedies so long as he has the right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c). However, where a claim not previously presented to the state court would be procedurally barred, further exhaustion is not required. Teague v. Lane, 489 U.S. 288, 297-98 (1989); Meachum v. Kane, 899 F. Supp. 1130, 1138 (S.D.N.Y. 1995); Taylor v. Murray, 855 F. Supp. 124, 126 (E.D. Va. 1994).

Because Petitioner did not raise his claim on direct appeal or to all levels of the state court under PCRA, his claim is

unexhausted. Petitioner's January 1997 PCRA petition was timely under PCRA's grace period allowance for first petitions filed after the effective date of the 1995 amendments to PCRA.³ However, it did not include the ineffective assistance of counsel claim raised in the instant Petition, and was aborted without appeal to the Pennsylvania Supreme Court. The state court held that Petitioner had waived the issue. Commonwealth v. Lewis, No. 8032-88 slip. op. at 5 (C.C.P. Delaware County, July 20, 1998). None of the narrow exceptions to permitting late review of a PCRA claim are applicable.⁴ Petitioner's assertion that he only recently learned that his parole could be denied is unavailing as he was told by the judge accepting his plea that he could be required to serve a maximum of 50 years incarceration. (Rep. & Recomm. at 7 & 9 n.1.) The only way for Petitioner to obtain

³ Generally, PCRA actions must be filed within one year of the date that the conviction becomes final. 42 Pa. Cons. Stat. Ann. § 9545(b)(1). However, under the grace period, Petitioner was given until January 17, 1997 to file a PCRA petition. See Act of Nov. 17, 1995 (Spec. Sess. No. 1), P.L. 1118, No. 32 §§ 1 & 3(1).

⁴ These exceptions are limited to three situations:

- (i) where the failure resulted from unconstitutional government interference with presentation of the claim;
- (ii) where the facts upon which the claim was predicated were unknown and could not have been ascertained by due diligence;
- (iii) where the constitutional right asserted was recognized by the Pennsylvania Supreme Court after the time period for filing and was applied retroactively.

42 Pa. Cons. Stat. Ann. § 9545(b)(1).

state court review of his claim at this point would be too make a strong prima facie showing of a miscarriage of justice.

Commonwealth v. Lawson, 549 A.2d 107, 112 (Pa. 1988). Petitioner has not shown or asserted such injustice. Accordingly, because Petitioner's claim is procedurally barred, the court will not require further exhaustion.

B. Procedural Default

Petitions under 28 U.S.C. § 2254 are not a substitute for direct appeal. Generally, if a prisoner has defaulted his claims in state court - that is he failed to present them to the proper tribunals in the proper manner - pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred. Coleman v. Thompson, 501 U.S. 722, 750 (1991). Federal courts can only review defaulted claims in a limited number of circumstances: (1) if it is shown that the rule was not independent and adequate; (2) if the petitioner demonstrates cause for the default and actual prejudice resulting therefrom; or (3) if the petitioner can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750; see also Doctor v. Walters, 96 F.3d 675, 683 (3d Cir. 1996) (discussing first and second exceptions).

Petitioner has failed to demonstrate the applicability of any of these exceptions. There is no indication that the state procedural rules under which Petitioner defaulted are anything but independent and adequate. Thus, the first exception is not implicated here.

Under the second exception, "cause" for the default requires a showing of some objective factor external to the defense that precluded Petitioner from complying with applicable state procedural rules. Murray v. Carrier, 477 U.S. 478, 488 (1986). Petitioner neither alleges nor offers evidence that his failure to comply results from external factors, i.e. circumstances beyond his control. Thus, his default cannot be excused under the second exception. Accordingly, the court need not address the issue of prejudice.

Lastly, the fundamental miscarriage of justice exception is generally limited to circumstances in which newly discovered evidence makes it more likely than not that a reasonable juror would find Petitioner not guilty. Schulp v. Delo, 513 U.S. 298, 327 (1995). In other words, this exception requires some showing of actual innocence. Petitioner neither alleges innocence nor puts forth any newly discovered exculpatory evidence which would justify the court's invocation of this exception.

As pointed out by Magistrate Judge Wells, Petitioner's claim is essentially an indirect and late attempt, brought in the incorrect forum, to collaterally attack the Parole Board's refusal of parole. See Rep. & Recomm. at 8 & 8 n.20 (noting that appropriate forum for seeking relief is Commonwealth Court). Accordingly, because of Petitioner's procedural default, his claim cannot be considered on the merits and will be dismissed without review.

IV. CONCLUSION

For the foregoing reasons, the court will approve and adopt the Report and Recommendation of the Magistrate Judge.

An appropriate Order follows.

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ORDER

AND NOW, TO WIT, this day of December, 2000, upon consideration of petitioner Willie James Lewis's Petition for Writ of Habeas Corpus, the Commonwealth of Pennsylvania's Answer thereto, and the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;
2. the Petition for Writ of Habeas Corpus is DENIED and DISMISSED without an evidentiary hearing; and
3. Petitioner has failed to make a showing of a denial of a constitutional right; thus, a certificate of appealability is DENIED.

SO ORDERED.

LOUIS C. BECHTLE, J.